No. 14555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Opinion Below.

The trial court wrote no opinion.

Jurisdiction.

The District Court had jurisdiction of this cause under 25 U. S. C. A., Section 345 (28 Stat. 286-305, as amended).

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Statement.

This case has been before this Court several times since the District Court, in 1945, determined that Lee Arenas was entitled to an allotment in severalty of the lands selected by him in 1927. (*Arenas v. United States,* 60 Fed. Supp. 411.) That judgment was affirmed by this Court as to the allotments of Lee Arenas and his deceased wife, Guadaloupe Arenas. (*United States v. Arenas,* 158 F. 2d 730 (1947), cert. den. 331 U. S. 842, 67 S. Ct. 1532.) Thereafter Arenas' attorneys (appellees herein) filed their petition for allowance of attorneys' fees, and for an equitable lien securing same, and the District Court awarded them fees on a percentage basis and impressed an equitable lien upon Arenas' allotted lands to secure payment of the fees and expenses allowed. The United States and Arenas appealed, and this Court affirmed the right to fees and expenses and to an equitable lien to secure same, but reversed "with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed." (*Arenas v. Preston,* 181 F. 2d 62, 67.) On remand, the District Court awarded judgment for fees and expenses in specified amounts in accordance with this Court's instructions, and the United States and Arenas again appealed. This Court affirmed said judgment (1953) in all respects as to the award of fees, expenses and lien against Lee Arenas. (*United States v. Preston,* 202 F. 2d 740, 743.) (The judgment for fees and expenses is included in the Record at pages 3-8.)

Thereafter appellees Preston, Clark and Sallee petitioned the District Court for an order of sale of Lee Arenas' allotted lands, or so much thereof as might be necessary, to satisfy the judgment for fees and expenses. On August 6, 1953, the District Court signed and on August 10, 1953, entered an order of sale, as prayed for [R. 8-14], providing, *inter alia,*

> "* * * that the proceeds of the sale * * * be distributed as follows, to wit: (1) to the costs and expenses of sale, including such amount as may be awarded as compensation to the commissioner in making said sale; (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight & 67/100 Dollars ($90,258.67), together with lawful interest thereon at the rate of 7% per annum from April 6, 1951; and (3) the balance to the United States of America in trust for plaintiff (Arenas)." [R. 12.]

On August 18, 1953, the United States moved the Court to delete from said order of sale the phrase "together with lawful interest thereon at the rate of 7% per annum from April 6, 1951," on the same grounds now urged in its brief. [R. 15-18.] Said motion was thereafter presented, argued and submitted, and on October 26, 1953, the District Court signed and on November 10, 1953, docketed and entered its judgment on said motion amending its order of sale above set forth to read as follows:

> "* * * it appearing to this court that the judgment and supplemental decree entered in this cause

* * * should bear interest at the rate of 7% per annum from a date six months subsequent to the entry of said Supplemental Judgment and Decree, it is

"Ordered that the paragraph of said Order for Sale of Real Property to Satisfy Supplemental Judgment and Decree beginning at line 13 and ending at line 21, page 4, thereof be and the same is hereby amended to read as follows:

"It Is Further Ordered that the proceeds of the sale of said lands, or sales, be distributed as follows, to wit: (1) to the costs and expenses of sale, including such amount as may be awarded as compensation to the commissioner in making said sale; (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight and 67/100 Dollars ($90,258.67), together with lawful interest thereon at the rate of seven per cent (7%) per annum from October 6, 1951; and (3) the balance to the United States of America in trust for the plaintiff.

"Done in open court October 26, 1953." [R. 18-19.]

This was a final order and judgment and no appeal was taken therefrom by the United States, or by Lee Arenas, within sixty days from the date of the entry thereof, *or at all.*

Thereafter, on November 30, 1953, the Court ordered a readvertisement of sale of Arenas' property, and a distribution of the proceeds of sale in precisely the same language set forth in its order and judgment entered on November 10, 1953. [R. 20-25. See language, *id.*, p.

23.] No appeal was ever taken from said order of sale. At the request of the United States and Lee Arenas, judicial sale of Arenas' property was postponed several times. On April 30, 1954, upon stipulation of the United States, Lee Arenas, and these appellees, the Court made and entered an order giving Lee Arenas permission to sell, subject to the approval of the United States, enough of his land to satisfy the judgment for fees and expenses [R. 29-31], the proceeds of such sale, or sales, to be deposited in the registry of the court, and the lien of the judgment to be transferred from the lands sold to the proceeds of sale so deposited. (*Id.*) Thereafter, Lee Arenas, through his attorney, sold several parcels of his land, the United States approved said sales, and the proceeds, less escrow expenses, were deposited in the registry of the court. [R. 29-45.] The total proceeds of sales thus deposited amounted to the sum of $122,114.00.

Thereafter appellee John W. Preston filed his petition for the distribution of the amount so deposited in the registry of the court, or so much thereof as would be necessary to satisfy the judgment for fees and expenses, together with 7% interest thereon from October 6, 1951, to John W. Preston, Oliver O. Clark and David D. Sallee [R. 46-53], and an order to show cause was issued thereon to appellants. In its return to said order to show cause the United States, for itself, Lee Arenas, and Richard Brown Arenas, stated *inter alia*:

> "These defendants renew and reassert separately and severally their opposition to the award and allow-

ance of interest from and out of the proceeds of the sales from and after October 6, 1951 * * *.".

As will later more fully appear, this attempt to renew its opposition to the allowance of interest on the judgment for fees was and is abortive, since no appeal was ever taken from the final order and judgment of October 26, 1953, entered November 10, 1953.

The United States filed notice of appeal "from those portions of the judgment docketed and entered herein on August 23, 1954, awarding and allowing * * * interest from and after October 6, 1951" on the judgment for fees. [R. 79-80.] Lee Arenas also filed a similar notice of appeal. [R. 83-84.]

Contentions of Appellants.

Both of the appellants contend:

1. That the District Court was without jurisdiction and power to allow interest on the judgment for fees and expenses in this suit; and

2. That the District Court was without jurisdiction and power to order payment out of the funds of Lee Arenas on deposit in the registry of the court of the expenses incurred and paid by appellee John W. Preston at the request and on behalf of Lee Arenas in an action to determine whether or not Eleuteria Brown Arenas was entitled to share with Lee Arenas the lands allotted to his deceased wife, Guadaloupe Arenas.

The foregoing contentions are without merit under the facts and law of this case.

Summary of Argument.

1. The District Court had equitable jurisdiction under Title 25, U. S. C. A., Section 345 to award interest on the judgment for attorneys' fees and expenses of suit. It also had power under its general equity jurisdiction to award interest on said judgment.

2. The District Court had equitable jurisdiction to order payment, out of the funds of Lee Arenas on deposit in the registry of the court, of the expenses authorized by him in the suit entitled "Lee Arenas v. Eleuteria Brown Arenas," in the District Court, to determine whether Eleuteria Brown Arenas was entitled to a share of the lands allotted to the deceased wife of Lee Arenas.

3. The order of the District Court awarding interest on the judgment for attorneys' fees and expenses of suit, which was entered on November 10, 1953, was not appealed from and is final, and said order is *res judicata* of the right of appellees to interest on said judgment.

ARGUMENT.

I.

The District Court Had Equitable Jurisdiction Under Title 25 U. S. C. A., Section 345 to Award Interest on the Judgment for Attorneys' Fees and Expenses of Suit. It Also Had the Power Under Its General Equity Jurisdiction to Award Interest on Said Judgment.

In substance, the United States and Lee Arenas contend that the District Court did not have jurisdiction to allow interest on the judgment for attorneys' fees and expenses of suit. They admit that "This Court has already held that the Act of August 15, 1894, 20 Stat. 305, 25 U. S. C. 345, consenting to suits by Indians to establish their rights to allotments necessarily included consent to subject the trust allotments to the payment of fees to attorneys who prosecuted the claims." (U. S. Br. p. 5.) In effect, they then assert that the equitable jurisdiction of the District Court ended at the point of allowance of fees. This is not the law.

The jurisdictional act (25 U. S. C. A., Sec. 345) under which this suit was brought and prosecuted conferred equity jurisdiction upon the District Court for every purpose necessary or incidental to the determination of an Indian's right to an allotment of land in severalty. This Court has so held. (*Arenas v. Preston,* 181 F. 2d 62, 66.) In that decision this Court said:

> "Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case

do not specifically authorize it. It is also argued that as to our case the applicable statute (*i. e.,* 25 U. S. C. A., sec. 345) does not authorize the impression of a lien upon the property, because its foreclosure would have the effect of disposing of a part of the property. But the Supreme Court rejected the argument by saying that it was intended that the restrictions on the allotted land, *which apply as well to produce from the land,* should afford protection to the allottee, rather than to restrict courts of equity from giving such protection. (Emphasis by the Court.) * * *.

"When the United States authorized the Indian to make the United States an adverse party in its own courts, it did so knowing that the Indian by himself was incapable of taking advantage of the privilege and that attorney fees and other expenses would be the unavoidable concomitant. It also knew that the Indian litigant, with few exceptions, was without the means to meet the necessary expenses. It seems to us that Congress could not have intended to commit the subject to its court with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction."

As we understand this Court's opinion, *supra,* the jurisdictional statute (25 U. S. C. A., Sec. 345), although silent as to impressing a lien, granted all general equity jurisdiction to the District Court and thereunder it had power to award such lien and to foreclose it. If this may be done, then it logically follows that the court, in the exercise of its general equity jurisdiction, may also award interest on the judgment from the date of its entry.

This Court's holding, *supra,* is in accord with the general rule that a court of equity whose jurisdiction has

been invoked for one purpose may determine all equities between the parties connected with the main subject of the suit, and equitable relief may thus be incidentally obtained even though the original bill would not lie for such relief alone.

30 C. J. S. 421, Sec. 68 of Equity, and many cases there cited;

Wenban Estate v. Hewlett, 193 Cal. 675;

Bettencourt v. Bank of Italy, 216 Cal. 174;

Colorado Power Co. v. Pac. Gas & Elec. Co., 218 Cal. 559;

Hendrickson v. Bertelson, 1 Cal. 2d 430;

Sears v. Rule, 27 Cal. 2d 131.

Dozens of California and other State cases are to like effect.

In its original judgment for attorneys' fees and expenses of suit the District Court provided that Lee Arenas should have a period of six months within which to pay the amount thereof. No payment was made within said period. Instead, Arenas and the United States delayed payment by appealing the judgment. Under such circumstances, other related principles of law and equity also apply.

It is well settled that, in equity, interest may be allowed on a claim as a means of compensating a creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73;

United States v. United Drill etc. Corp., 183 F. 2d 998;

Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;

Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;

Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380;

Abell v. Anderson, 148 F. 2d 372, 375;

Spalding v. Mason, 161 U. S. 375, 396, 16 S. Ct. 392;

United L. & P. Co. v. Grand Rapids Tr. Co., 85 F. 2d 331, 338;

Seaboard Surety Co. v. Spear, 119 F. 2d 849, 852.

Many other cases are to like effect.

As stated in *Young v. Godbe,* 82 U. S. 562, and in *United States v. United Drill etc. Corp.,* 183 F. 2d 998:

> "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest for the delay in payment * * *.
>
> "If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account."

In *Miller v. Robertson,* 266 U. S. 243, 45 S. Ct. 73, *supra,* the plaintiff sued Miller, as Alien Property Custodian; and White, as Treasurer of the United States, and certain others. Thus, the United States was a party, and defended by its Attorney General. In its discussion of the question of interest by way of damages for delay in payment of the obligation the Supreme Court said (45 S. Ct. 73 at p. 78):

> "While the suit, as held in *Banco Mexicano v. Deutsche Bank,* 263 U. S. 591, 603, 44 St. Ct. 209, 68 L. Ed. 465 (affirming 53 App. D. C. 266, 289 F. 924), is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign im-

munity from liability for interest (citing cases) does not apply.

"Compensation is a fundamental principle of damages whether the action is in contract or in tort. Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis v. Innerarity,* 6 How. 146, 154, 12 L. Ed. 380. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding v. Mason,* 161 U. S. 375, 396, 16 S. Ct. 592, 40 L. Ed. 738."

In the case at bar the suit is against the United States, but the claim for fees is not against it; the claim is against Lee Arenas, and only Arenas is liable to pay it out of property recovered for him by appellees. This claim has been opposed by the United States at every step of the proceeding, and it is in no position to set up equities; it now resorts to a technicality, which, as appears from the authorities, *supra*, has no application here.

Other cases hold that the District Court may allow interest on a claim as an item of incidental damages for failure to pay the claim promptly when due.

Ferguson v. Union Nat. Bank, 126 F. 2d 753, 759;
Curtis v. Innerarity, 6 How. 154, 12 L. Ed. 380;
Spalding v. Mason, 161 U. S. 375, 396, 15 S. Ct. 592;
R. R. Credit Corp. v. Hawkins, 80 F. 2d 818, 825-826;

Ticonic Nat. Bank v. Sprague, 303 U. S. 407, 408;
Calif. Civ. Code, Sec. 2905.

It may also be noted in this connection that federal appellate courts have discretion whether or not to allow damages or interest in cases of affirmance upon the theory that interest for the time an appeal is pending is damages for delay.

Continental Oil Co. v. United States, 184 F. 2d 802, 821-822 (9 Cir.);
Blair v. Dunham, 139 F. 2d 260, 261;
Austrian v. Williams, 103 Fed. Supp 64;
Schill v. Cochran, 107 U. S. 625, 27 L. Ed. 543.

There is thus abundant authority to sustain the allowance of interest on the judgment of the District Court.

The Anglin & Stevenson Case Is Distinguishable From the Case at Bar.

In view of the authorities above cited and discussed it is clear that the decision in *Anglin & Stevenson v. United States,* 160 F. 2d 670, is not in point. First, the United States was not a party to the heirship proceedings filed in Oklahoma State district courts by various groups of Indians claiming to be the heirs of Jackson Barnett, a full blood Creek Indian; but the United States intervened and caused a transfer of said heirship proceedings to the Federal District Court. Thus the only jurisdiction acquired by the Federal District Court over the United States arose out of the express terms of its voluntary consent as expressed in its petition of intervention. All of the property of Barnett, consisting of land and a large amount of money, was and for many years had been in the control of the Government, and none thereof was recovered or

preserved by the attorneys for the estate of Barnett. It may also be noted that the heirship proceeding was one at law and not in equity, whereas the case at bar is equitable.

In the *Anglin & Stevenson* case, the District Court, sitting in equity for the purpose of allowing fees, and acting within the scope of its discretion, denied interest on the judgment for attorneys' fees. In the case at bar the District Court, acting within its discretion, allowed interest on the judgment for attorneys' fees. In other words, in the *Anglin & Stevenson* case the District Court obviously believed that the delay in payment of the judgment did not, in equity, justify adding interest thereto. In the case at bar the District Court felt that the delay in payment of judgment for fees warranted, in equity, the imposition of interest.

As already noted, it is well settled that, in equity, the court may allow interest on a judgment by way of compensation or of damages for delay in the payment thereof.

Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73;
United States v. United Drill Corp., 183 F. 2d 998;
Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;
Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;
Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380;
Abell v. Anderson, 148 F. 2d 372, 379;
United L. & P. Co. v. Grand Rapids, etc. Co., 85 F. 2d 311, 338;
Spalding v. Mason, 161 U. S. 375, 396, 16 S. Ct. 392;
Seaboard Surety Co. v. Spear, 119 F. 2d 948, 952.

See other cases, *supra.*

It should also be observed that in the *Anglin & Stevenson* case, on appeal, the litigants were trying to force their claim for interest, which could not be done because the court below had exercised its discretion and had denied the claim. This is the distinction between the two cases.

II.

The District Court Had Equitable Jurisdiction to Order Payment, Out of the Funds of Lee Arenas on Deposit in the Registry of the Court, of the Expenses Authorized by Him in the Suit Entitled "Lee Arenas v. Eleuteria Brown Arenas," in the District Court, to Determine Whether Eleuteria Brown Arenas Was Entitled to a Share of the Lands Allotted to the Deceased Wife of Lee Arenas.

The judgment in *Lee Arenas v. United States*; 60 Fed. Supp. 411, adjudged that Lee Arenas was entitled to an allotment on his own account, and to the allotment of his deceased wife Guadaloupe Arenas, and also to the allotments of his deceased father and brother. On appeal, this Court affirmed the judgment as to the allotments to Lee Arenas and Guadaloupe Arenas, but reversed as to the allotments of his father and brother. The judgment, as affirmed by this Court, therefore awarded to Lee Arenas his own allotment and the allotment of his deceased wife Guadaloupe Arenas. Thereafter the United States determined, under 25 U. S. C. A., Section 372, that Eleuteria Brown Arenas was the adopted daughter (under tribal custom) of Lee and Guadaloupe Arenas. In this situation Lee Arenas requested appellees, as his attorneys, to file an action in the District Court for an adjudication that, by virtue of the judgment in the allotment proceed-

ing, he was entitled to all of the lands allotted to his deceased wife. The action was filed and tried, and the trial court held that the determination of the heirs of Guadaloupe Arenas had and made under 25 U. S. C. A., Section 372 was *res judicata* and binding upon Lee Arenas, notwithstanding the judgment of the District Court (60 Fed. Supp. 411) as affirmed by this Court. (158 F. 2d 730.) In the preparation, trial and appeal of the action brought by Lee Arenas v. Eleuteria Brown Arenas, appellee John W. Preston paid out of his funds, as expenses of suit, the total amount of $468.19.

The Disrtict Court ordered payment to appellee John W. Preston of said amount of $468.19 out of the funds of Lee Arenas on deposit in the registry of the court, and appellants allege this was error.

The facts stated, *supra,* show that the amount of $468.19 in question was expended in a proper effort to make fully effective the judgment awarding the allotment of Guadaloupe Arenas to Lee Arenas; and in that respect the action against Eleuteria Brown Arenas was, in reality, a part of the allotment proceeding and was integrated therewith.

It should also be noted that the funds in the registry of the court were under its control and it had power, under its equity jurisdiction, to require Lee Arenas to do equity. The necessary parties, subject matter, and property were before the Court, and no reason existed why it should not order reimbursement of expenses authorized by Lee Arenas to preserve intact his judicial allotment.

III.

The Order of the District Court Awarding Interest on the Judgment for Attorneys' Fees and Expenses of Suit, Which Was Entered on November 10, 1953, Was Not Appealed From and Is Final, and Said Order Is Res Judicata of the Right of Appellees to Interest on Said Judgment.

The judgment awarding attorneys' fees contained a provision retaining jurisdiction over the action and the parties thereto and the subject matter thereof for stated purposes and, specifically, "in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 7-8.] This Court affirmed. (*United States v. Preston,* 181 F. 2d 740.) On remand, the District Court made and entered its order, on November 10, 1953, awarding interest on the judgment for fees. This judgment was never appealed from. The present appeal is from an order disbursing the amount due appellees among them as their interests therein appear; it is not an order *awarding* interest on the judgment, but it is an order to *disburse* the amount of principal and interest due on the judgment to appellees.

The order of November 10, 1953, being final and not appealed from, is *res judicata* of appellees' right to interest on the judgment; and appellants are estopped to question the validity of said order.

Partmar Corp. v. Paramount Pictures, 347 U. S. 89, 98, 74 S. Ct. 414;

United States v. Munsingwear, Inc., 340 U. S. 36, 71 S. Ct. 104;

C. I. R. v. Sunnen, 333 U. S. 591, 68 S. Ct. 715;

So. Pac. Co. v. United States, 168 U. S. 1, 18 S. Ct. 18, 27.

Dozens of cases, to the same effect, could be cited.

In *Southern Pacific Co. v. United States,* 18 S. Ct. 18, *supra,* the Supreme Court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *."

The United States, by its motion to delete from the order of sale the phrase "together with lawful interest thereon at the rate of 7% per annum from April 6, 1951," put squarely in issue the right of the appellees to interest and also the power of the District Court to award interest on the judgment, and this more clearly appears from the Points and Authorities attached to the motion. [See R. 15-18.] The order entered on the motion of the United States amended the order of sale in one respect only, *i. e.,* interest should run from October 6, 1951, instead of from April 6, 1951. In all other respects the motion to delete was denied.

There was and is complete identity of parties, subject matter and issues involved in the Government's motion to delete the phrase allowing interest and in its present appeal from the order of disbursement. Therefore, appellants are estopped to question the order allowing interest.

A. The Payment Into the Registry of Court of Proceeds of Sales of a Portion of Arenas' Lands Was an Offer to Redeem and a Redemption of All His Lands From Lien of Judgment.

There is still another reason why appellants are estopped to question the validity of the order allowing interest on the judgment for fees. Following entry of the order entered November 10, 1953 (which was not appealed from) both Lee Arenas and the United States requested that appellees agree that Lee Arenas be permitted to sell, at private sale, sufficient of his lands to satisfy the judgment with interest. An order was made, based on that stipulation. [R. 35-38.] Thereafter Lee Arenas, by his then attorney, Irl D. Brett, made sales of several parcels of his allotted lands, and the proceeds, less escrow charges, amounting net to the total of $122,114.00, were paid into the registry of the court, and the lien of the judgment, with interest at the rate of 7% per annum from October 6, 1951, was transferred from the lands to said funds thus deposited.

The legal effect of the stipulations and orders, made and entered after the order allowing interest on the judgment, was to transfer the lien of the judgment with interest to and upon the funds in the registry of the court, and that lien could be discharged only by paying the full amount of the principal and interest of the judgment.

Stated otherwise, the payment of the proceeds of the several sales of Arenas' lands, under the facts and circumstances stated, to satisfy the lien of the judgment was, in fact, a redemption of all of his lands from said lien. The money thus paid into court was more than an offer to redeem; it was, in fact, and by stipulation of the parties,

including the United States, a redemption from the lien of said judgment including the interest due thereon.

Calif. Civ. Code, Secs. 2905, 1504;

16 Cal. Jur. 347 *et seq.*, and cases cited;

Golden State etc. Co. v. Ward Motor Co., 185 Cal. 402;

Loughborough v. McNevin, 74 Cal. 250;

Leet v. Armbruster, 143 Cal. 663;

Nelson v. Yonge, 73 Cal. App. 704.

B. In Order to Redeem His Lands, Arenas Was Required to Pay Judgment and Also Damages for Delay.

There can be no extinguishment or discharge of a lien by partial performance of the act for which the lien is security. There must be full performance, including the payment of damages, if any, for delay.

Civ. Code, Secs. 2905, 2912;

16 Cal. Jur. 324, 347, Secs. 25, 46 of Liens;

San Pedro Lbr. Co. v. Reynolds, 121 Cal. 74;

Loughborough v. McNevin, 74 Cal. 250.

Section 2905 of the California Civil Code provides:

> "Redemption from a lien is made by performing, or offering to perform, the act for the performance, of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

Section 2912 of said Code provides:

> "The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible."

The judgment for attorneys' fees was entered herein on April 6, 1951, and Arenas was given six months from said date within which to pay the judgment. More than three years have elapsed since the expiration of the stay period. A part of that period was consumed by the appeal from said judgment. Nearly two more years have been consumed by appellants in efforts to sell enough of Arenas' property to satisfy the judgment and by the current appeal. Apparently, both appellants have lost sight of the fact that this proceeding is one in equity, and that it would be grossly inequitable to permit them to delay payment of the judgment for many years without payment of damages (here interest) for the delay. The authorities cited under Point I, *ante,* abundantly support the proposition that interest may be allowed in equity under the circumstances of this case. Indeed, equity demands and California statutes provide for interest as damages for delay in this case.

Conclusion.

For the foregoing reasons, the orders appealed from should be affirmed.

Respectfully submitted,

John W. Preston,

Oliver O. Clark,

David D. Sallee,

Attorneys and Appellees.